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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-~~76-919~~

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, *Petitioner,*

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, AND THE HONORABLE BERNARD W. THOMAS, DISTRICT COURT JUDGE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, AND THE HONORABLE BERNARD W. THOMAS, DISTRICT COURT JUDGE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

The Fort Belknap Indian Community of the Fort Belknap Indian Reservation in Montana petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Montana.

OPINIONS BELOW

The judgment of the Montana Supreme Court (App. p. 1a) is reported at 554 P.2d 1115 (Mont. 1976). The state district court's order (App. p. 2a) is not reported.

JURISDICTION

The judgment of the Supreme Court of the State of Montana was entered on October 7, 1976. Jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Did Congress in the Indian Reorganization Act, the Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, waive the immunity from suit of the Fort Belknap Indian Community in a tort action involving the conduct of a tribal police officer?

STATUTES INVOLVED

Indian Reorganization Act

Section 16 of the Indian Reorganization Act, codified at 25 U.S.C. § 476 provides:

> Organization of Indian tribes; constitution and by laws; special election
>
> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by-laws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be ratified and approved by the Secretary in the same manner as the original constitution and by-laws.

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Section 17 of the Indian Reorganization Act, codified at 25 U.S.C. § 477, provides:

> The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

FORT BELKNAP INDIAN COMMUNITY CORPORATE CHARTER

Whereas, the Fort Belknap Indian Community of the Fort Belknap Reservation in Montana constitutes a recognized Indian Community organized under a constitution and by-laws ratified by the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation on October 19, 1935, and approved by the Secretary of the Interior on December 13, 1935, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378); and

Whereas, more than one-third of the adult Indians on the Fort Belknap Indian Reservation who are members of the Gros Ventre and Assiniboine Tribes have petitioned that a charter of incorporation be granted to such community, subject to ratification by vote of said Indians living on said reservation;

Now, therefore, I, Charles West, Acting Secretary of the Interior, by virtue of the authority conferred upon me by the said Act of June 18, 1934 (48 Stat. 984), do hereby issue and submit this charter of incorporation to the Fort Belknap Indian Community of the Fort Belknap Reservation to be effective from and after such time as it may be ratified by a majority vote of the adult Indians living on the reservation, at an election in which at least thirty percent of the eligible voters vote.

1. *Corporate Existence.* In order to further the economic development of the Fort Belknap Indian Community of the Fort Belknap Reservation in Montana by conferring upon the said community certain corporate rights, powers, privileges and immunities; to secure for the members of the Community an assured economic Independence; and to provide for the proper exercise by the Community of various functions heretofore performed by the Department of the Interior, the aforesaid community is hereby chartered as a body politic and corporate of the United States of America, under the corporate name "The Fort Belknap Indian Community"...

5. *Corporate Powers.* The Community, subject to any restrictions contained in the Constitution and laws of the United States, or in the Constitution and By-laws of the said community, or in this Charter, shall have the following corporate powers:...

(i) To sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power to sue and to be sued shall not be deemed a consent by the Community or by the United States to the levy of any judgment, lien or attachment upon the property of the Community other than income or chattels specially pledged or assigned.

(j) To exercise such further incidental powers not inconsistent with law, as may be necessary to the conduct of corporate business.*

STATEMENT OF THE CASE

Petitioner, the Fort Belknap Indian Community of the Fort Belknap Indian Reservation is a federally recognized Indian Community. The Community is made up of the Gros Ventre and Assiniboine Tribes and its occupies a reservation in the State of Montana. By the Treaty of October 17, 1855, 11 Stat. 657, the Act of April 15, 1874, 18 Stat. 28, the Act of May 1, 1888, 25 Stat. 113, and the Executive Order of July 5, 1873, the United States set aside an Indian reservation for the use and occupancy of the Fort Belknap Indian

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* The Corporate Charter is set out in its entirety in the Appendix. (App. pp. 5a-13a).

Community. The Fort Belknap Indian Community has adopted a constitution and by-laws in accordance with Section 16 of the Indian Reorganization Act (the "IRA") authorizing it to exercise official governmental powers as a federally recognized Indian tribe. The constitution and by-laws were approved by the Secretary of the Interior on December 13, 1935. In addition, the Fort Belknap Indian Community has adopted pursuant to Section 17 of the IRA a corporate charter as a federal Indian corporation authorizing it to transact corporate business to further the economic development of the Fort Belknap Reservation. The corporate charter was issued by the Secretary of the Interior on July 29, 1937. Respondents are the District Court of the Twelfth Judicial District for the State of Montana in and for the County of Blaine and the Honorable Bernard W. Thomas, District Court Judge.

On September 18, 1975, one James W. Gardipee filed suit in the District Court of the Twelfth Judicial District seeking $75,000 for general damages, $5,000 for special damages and $100,000 for punitive damages against the Fort Belknap Indian Community for an alleged intentional and malicious tort committed by Leon Martinez, a police officer employed by the Fort Belknap Indian Community. Martinez was not named as a defendant. On November 20, 1975, Gardipee filed an amended complaint in the same court seeking $75,000 for general damages, and $5,000 for special damages against the Fort Belknap Indian Community for wanton and malicious assault by Martinez or, in the alternative, for negligent conduct by Martinez.[1] In

[1] A copy of the Amended Complaint is reproduced in the Appendix to this Petition (App. pp. 3a-5a).

the amended complaint, Gardipee alleged that he was arrested by Leon Martinez who was acting in the performance of his duties as Chief of Police of the Fort Belknap Indian Community for driving without a valid Montana operator's license on the Fort Belknap Reservation. Because Gardipee did not post bond at the time of his arrest, he was transported by the police officer off the reservation to the Blaine County Jail in Chinook, Montana for incarceration pending the posting of a bond, pursuant to a working agreement between the Fort Belknap Indian Community and Blaine County. The amended complaint further alleged that during the trip Gardipee requested and received permission to leave the automobile and the custody of Leon Martinez, and that subsequently, a dispute arose with the result that Martinez shot Gardipee and injured his leg.

On December 11, 1975, the Fort Belknap Indian Community moved to dismiss the amended complaint. On February 23, 1976, the District Court of the Twelfth Judicial District by Judge A. W. Thomas denied the motion to dismiss finding both subject matter jurisdiction over the alleged tort because it occurred off the reservation, and personal jurisdiction over the Fort Belknap Indian Community because of the inclusion in the corporate charter of the community of language authorizing the Indian corporation to sue and to be sued.

On May 11, 1976, the Fort Belknap Indian Community filed a Petition for Writ of Supervisory Control or Other Appropriate Writ in the Montana Supreme Court seeking a reversal of the February 23, 1976 jurisdictional order of the state district court. On May 18, 1976, the Montana Supreme Court denied

the petition without prejudice and requested clarification as to whether the alleged tortious conduct of the tribal police officer occurred on or off the Fort Belknap Indian Reservation. On July 8, 1976, the Fort Belknap Indian Community filed a second Petition for Writ of Supervisory Control or Other Appropriate Writ in the Montana Supreme Court once again seeking to have a reversal of the district court's jurisdictional order. On October 7, 1976, the Supreme Court of the State of Montana entered a final order denying the petition.[2]

REASONS FOR GRANTING THE WRIT

I

This Case Presents an Unresolved Issue of Great Importance to the 180 American Indian Tribes Which Have Accepted the Indian Reorganization Act.

The Fort Belknap Indian Community seeks to have this Court resolve the question of whether Congress, in enacting 25 U.S.C. § 477 authorizing Indian tribes to incorporate as federal business corporations, effected a waiver of sovereign immunity over the official governmental actions of America's Indian tribes. The issue is of great importance to American Indians. The Montana decision, which finds a broad waiver of sovereign immunity extending beyond tribal business transactions to official governmental actions, is fundamentally at odds with this Court's decisions on waivers of sovereign immunity. *Cf. New York* v. *United States,*

[2] The October 7, 1976 Order of the Montana Supreme Court denying the Petition for Writ of Supervisory Control or Other Appropriate Writ filed by the Fort Belknap Indian Community is a final judgment within the jurisdiction of 28 U.S.C. § 1257(3). See Fisher v. District Court, 424 U.S. 382, 385, n. 7 (1976); Madruga v. Superior Court, 346 U.S. 556, 557 (1954).

326 U.S. 572, 579 (1946); *Ohio* v. *Helvering,* 292 U.S. 360, 369 (1934).

This Court has held that sovereign immunity protects the treasures and official authorities of governments from judicial intervention except in narrowly defined circumstances. In the case of the United States, sovereign immunity is derived by implication, *Monaco* v. *Mississippi,* 292 U.S. 313 (1934). State sovereign immunity is secured by the Eleventh Amendment, *Edelman* v. *Jordan,* 415 U.S. 651 (1974). Similarly, the sovereign immunity of federal Indian tribes arises because of their unique status as dependent sovereign nations, *United States* v. *United States Fidelity and Guaranty Co.,* 309 U.S. 506 (1940).

The nature and extent of sovereign immunity has been clarified by this Court in a number of significant decisions. Each holding preserves intact the right of governments to be immune from those suits whose judgments would result in either a raid on the government's treasury or interference with the administration of the government's official operations. *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949); *Land* v. *Dollar,* 330 U.S. 731 (1947). Each decision confirms that a waiver of sovereign immunity requires explicit sovereign action. *Great Northern Life Insurance Co.* v. *Read,* 322 U.S. 47, 53-55 (1943); *Parden* v. *Terminal R. Co.,* 377 U.S. 184, 186 (1964); *Fitzpatrick* v *Bitzer,* — U.S. —, 49 L.Ed.2d 614, 96 S.Ct. 2666 (1976). These important principles are swept aside by the Montana decision.

The Montana courts read the Fort Belknap Indian Comunity's corporate charter provision "to sue and to be sued" to effect a waiver of sovereign immunity

for official tribal governmental actions rather than simply tribal business transactions. The Montana holding ignores Congress' plan in the Indian Reorganization Act to create both tribal governmental entities with their sovereign immunity intact, and separate and distinct corporate business entities with the authority to waive their sovereign immunity for specifically identified business transactions. *See, e.g.,* S. Rep. 3645, 73d Cong., 2d Sess. (1934); Solicitor's Opinion M-36515, 65 I.D. 483 (Nov. 20, 1958); Solicitor's Opinion M-36119, 61 I.D. 8 (Feb. 14, 1952). Similarly, the lower courts' holding frustrates the scheme of the Fort Belknap Indian Community, a sovereign Indian government, to maintain separate tribal governmental and business entities through the adoption of a constitution (without the language "to sue and to be sued") and the acceptance of a separate corporate charter (with the language "to sue and to be sued").

Moreover, the Montana decision for which review is sought contradicts the teachings of all prior decisions which have considered the nature and scope of tribal sovereign immunity. *See, e.g., Haile* v. *Saunooke,* 246 F.2d 293 (4th Cir. 1957), *cert. denied,* 355 U.S. 893 (1957); *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967); *Cherokee Nation* v. *State of Oklahoma,* 461 F.2d 674 (10th Cir. 1972); *Hamilton* v. *Nakai,* 453 F.2d 152 (9th Cir. 1972); *Morgan* v. *Colorado River Indian Tribe,* 443 P.2d 421 (Ariz. 1968). In addition, the Montana decision conflicts with prior decisions holding that the waiver of sovereign immunity accomplished by the language "to sue and to be sued" contained in the corporate charters of Indian tribes organized under the IRA is restricted to specifically

identified business transactions where the tribe has expressly waived its sovereign immunity. *Maryland Casualty Co.* v. *Citizens National Bank of West Hollywood,* 361 F.2d 517 (5th Cir. 1966), *cert. denied,* 385 U.S. 918 (1967); *Martinez* v. *Southern Ute Tribe,* 374 P.2d 691 (Colo. 1962). *Cf., Namekagon Dev. Co.* v. *Bois Forte Res. House Au.,* 395 F. Supp. 23 (D. Minn. 1974), *aff'd,* 517 F.2d 508 (8th Cir. 1975).

Because the holding of the Montana courts is at odds with basic principles of sovereign immunity, and because it presents the first judicial determination that the waiver of sovereign immunity provided for in the corporate charters of Indian tribes organized under the IRA affects not only specifically identified corporate business transactions, but also official tribal governmental actions, the 131 tribes with corporate charters similar to that of the Fort Belknap Indian Community[3] require a clarification from this Court as to the precise nature and scope of the waiver of sovereign immunity contained in their federally approved charters.

In the absence of review by this Court, the Montana decision poses a direct threat to the sovereign authority of these tribes. Since the Montana suit seeks significant monetary damages against the Fort Belknap Community for official actions of a tribal police officer, it has caused a serious chilling effect on the exercise of Fort Belknap tribal self-government. The Fort Belknap Indian Community must now take steps to limit its liability in order to protect scarce tribal funds. The level of tribal services may have to be sig-

[3] *See,* Comment, Tribal Self-Government in the Indian Reorganization Act of 1934, 70 Mich.L.Rev. 955, 972 (1972).

nificantly reduced. Other tribes will soon be forced to take similar steps. Unless this Court reviews the Montana decision tribal self-government, strengthened by recent congressional enactments [4] and important rulings of this Court, [5] will be seriously undermined.

II

The Political and Business Development Provisions of the Indian Reorganization Act Are Separate and Distinct.

The critical mistake of the Montana decision lies in its assumption that Congress intended the IRA to waive the immunity from suit of tribes for their official governmental actions. To the contrary, a review of the Act and its purposes reveals that Congress intended the IRA to strengthen the authority of tribal governments on one hand, while at the same time to permit tribal business corporations to enter into reservation development transactions. This dual purpose was carefully explained by the Solicitor of the Department of the Interior:

> The purposes of Congress in enacting section 16 of the Indian Reorganization Act was to facilitate and to stabilize the tribal organization of Indians residing on the same reservation, for their common welfare. It provided their political organization. The purpose of Congress in enacting section 17 of the Indian Reorganization Act was to empower the Secretary to issue a charter of business incorporation to such tribes to enable them to conduct business through this modern device,

[4] *E.g.*, Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.* Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.*.

[5] Fisher v. District Court 424 U.S. 382 (1976); Bryan v. Itasca County, — U.S. —, 48 L.Ed.2d 710, 96 S.Ct. 2102 (1976).

> which charter cannot be revoked or surrendered except by act of Congress. *This corporation, although composed of the same members as the political body, is to be a separate entity, and thus more capable of obtaining credit and otherwise expediting the business of the tribe, while removing the possibility of federal liability for activities of that nature. As a result, the powers, privileges and responsibilities of these tribal organizations materially differ.* (Emphasis supplied.)

69 I.D. 483, 484 (1958). That Congress intended to create separate governmental and corporate business bodies for tribes accepting the IRA has also been recognized by this Court. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151 (1973).

In Section 17 of the IRA, Congress provided the tribes with federal charters which granted them the power to manage, operate and dispose of property, and in addition "such further powers as may be incidental to the conduct of corporate business not inconsistent with law." 25 U.S.C. § 477. Based on this conferral of "further incidental powers," the Secretary of the Interior issued over one hundred corporate charters each of which contains a separate provision allowing the corporations to sue and to be sued. The Fort Belknap Indian Community's federal corporate charter confers upon the Community certain corporate rights, powers, privileges, and immunities designed to further the economic development of the Fort Belknap Indian Reservation. The Community has utilized its corporate charter to establish numerous reservation businesses, including a 2,800 acre wheat farm.

In enacting Section 16 of the IRA, Congress confirmed the inherent sovereign powers of the Indian

tribes.[6] These powers of self-government have been often upheld by this Court. *Williams* v. *Lee*, 358 U.S. 217 (1959); *United States* v. *Mazurie*, 419 U.S. 544 (1975); *Fisher* v. *District Court*, 424 U.S. 382 (1976). In accordance with its powers of self-government, the Fort Belknap Indian Community has adopted a constitution and by-laws authorizing it to govern the territory of the Fort Belknap Indian Reservation. Included in its constitution are provisions authorizing the Community to undertake a program of law enforcement on the reservation. Pursuant to that authority the Fort Belknap Indian Community has established a law and order code,[7] and has employed several law enforcement officials, including Leon Martinez, the police officer whose actions formed the basis of Gardipee's complaint in this case.

The courts which have construed the waiver of sovereign immunity contained in the sue and to be sued provisions in tribal corporate charters issued under the IRA have honored Congress' scheme. They have held that any waiver must be strictly limited to corporate business transactions where chattels and income have been specifically pledged. *Namekagon Dev. Co.* v. *Bois Forte Res. House Au.*, 395 F. Supp. 23 (D.

[6] The Solicitor of the Department of the Interior in a contemporaneous opinion issued a comprehensive analysis of the tribal governmental powers of IRA tribes. The tribal powers were characterized as inherent powers of a limited sovereignty which have never been extinguished. Included in the powers enumerated in the Solicitor's Opinion is the right of a tribe to maintain law and order on its reservation. 55 I.D. 14, 48-64 (1934).

[7] The Fort Belknap Law and Order Code established tribal courts, rules for civil and criminal procedure, a code defining criminal offenses, juvenile offenses and domestic relations; and adopted the Montana traffic laws for reservation highways.

Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975); *Maryland Casuality Co.* v. *Citizens National Bank of West Hollywood*, 361 F.2d 517 (5th Cir. 1966), *cert. denied* 385 U.S. 918 (1967). *See also, Martinez* v. *Southern Ute Tribe*, 374 P.2d 691 (Colo. 1962). In each of these cases the court limited the waiver of sovereign immunity to corporate business assets, and in so doing acknowledged that the IRA preserved the sovereign immunity of the tribal governments.

The congressional scheme found in the IRA as well as the official governmental and business policies of over one hundred tribes with IRA constitutions and charters are threatened by the Montana decision. Furthermore, current federal policies designed to strengthen tribal self-government such as the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 451, *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450, *et seq.*, are frustrated by the Montana decision, particularly the express language in the Indian Self-Determination and Education Assistance Act which provides that nothing in its provisions shall be construed as impairing the sovereign immunity from suit enjoyed by the tribes. 25 U.S.C. § 450n.[8] In addition, the Montana

[8] The primary purpose of the Indian Self-Determination and Education Assistance Act of 1975 is to have tribes take over many governmental services historically provided by the Bureau of Indian Affairs. Thus, in 1976, tribes began sharing with the Bureau of Indian Affairs over $287,306,000 in congressionally appropriated funds for reservation social services, law enforcement, housing, management of tribal governments, school operations, and road maintenance. Similarly, in 1976, the Fort Belknap Indian Community shared with the Bureau of Indian Affairs $652,914 in congressionally appropriated funds allocated for reservation services. [Figures obtained from the Office of Budget, Bureau of Indian Affairs, Washington, D.C. and Billings, Montana.] If liti-

decision undermines a recent decision of this Court which held *inter alia* that Congress did not consent to have tribes be subject to state court jurisdiction when it enacted Public Law 280, 28 U.S.C. § 1360, to allow reservation Indians to utilize state courts to resolve their private disputes. *Bryan* v. *Itasca County,* — U.S. —, 48 L.Ed.2d 710, 721, 96 S.Ct. 2102 (1976). This Court in *Bryan* v. *Itasca County, supra,* acknowledged the need to protect tribal sovereignty and reservation resources from intrusions not expressly authorized by Congress, to keep tribes from becoming little more than "private voluntary organizations." 48 L.Ed.2d at 721. The Montana decision thus ignores both recent acts of Congress and recent decisions of this Court. It opens the door for unlimited erosion of tribal treasuries. It must, therefore, be reviewed by this Court.

III

The Montana Construction of the Indian Reorganization Act Is Fundamentally Inconsistent with Concepts of Tribal Sovereign Immunity Long Recognized by This Court.

The decision of the Montana courts is fundamentally in conflict with holdings of this Court which strictly construe any waiver of sovereign immunity of an American Indian tribe. In *United States* v. *United States Fidelity and Guaranty Co.,* 309 U.S. 509 (1940), this Court prohibited a cross-claim against a

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gants can obtain money judgments against tribes for events arising out of official governmental activities, federal funds obtained by the tribes by contract under the Indian Self-Determination and Education Assistance Act as well as tribal funds derived from taxes and reservation development, may be seized to satisfy the judgments, and Congress' express directive in 25 U.S.C. § 450n will be violated.

tribe in a suit by the United States on behalf of the Choctaw and Chickasaw Nations:

> No statutory authority granted jurisdiction to the Missouri Court to adjudicate a cross-claim against the United States. The public policy which exempted the defendant as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. *These Indian Nations are exempt from suit without congressional authorization. It is as though the immunity which was theirs as sovereign passed to the United States for their benefit, as their tribal properties did.* Possessing this immunity from direct suit, we are of the opinion it possesses a similar immunity from cross-suit. This seems necessarily to follow if the public policy which protects a quasi-sovereignty from judicial attack is to be made effective. (Emphasis supplied.)

309 U.S. at 512, 513. This Court has recognized that Congress must authorize any waiver of sovereign immunity for Indian tribes, *Turner* v. *United States,* 248 U.S. 354 (1919). Furthermore, the terms of any waiver should be express as to persons, courts, and procedures. *See, e.g., Great Northern Life Insurance Co.* v. *Read,* 322 U.S. 47, 53-54 (1943); *United States* v. *Shaw,* 309 U.S. 495, 500-501 (1940). The principles of sovereign immunity which apply to Indian tribes are no different from the concepts of sovereign immunity which have long been recognized for the United States and the states. Each of these governments is immune from those suits whose judgments will either raid the public treasury or interfere with the administration of official government functions. *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949); *Land* v. *Dollar,* 330 U.S. 731 (1947); *Great Northern Life Insurance*

Co. v. *Read,* 322 U.S. 47, 53-54 (1943); *Monaco* v. *Mississippi,* 292 U.S. 313 (1934); *Edelman* v. *Jordan,* 415 U.S. 651 (1974).

Because Congress did not select express language to waive the sovereign immunity of tribal corporations,[9] any waiver of sovereign immunity effected by the corporate charter of the Fort Belknap Indian Community should be narrowly construed. *United States* v. *United States Fidelity and Guaranty Co.,* 309 U.S. 506 (1940); *Great Northern Life Insurance Co.* v. *Read,* 322 U.S. 47 (1943); *Monaco* v. *Mississippi,* 292 U.S. 313 (1934).[10] Thus, to the extent that any waiver was accomplished by reason of the adoption of the language "to sue and to be sued" in the corporate charter of the Fort Belknap Indian Community, it is limited to proprietary and corporate business activities. Further, it is limited to a waiver with respect to income or chattels specially

[9] The language "sue and to be sued" was not used in the IRA, but rather was inserted into the corporate charters issued pursuant to the Act. In this respect, the IRA which merely provided that tribal corporations were to be granted "such further powers as may be incidental to the conduct of corporate business not inconsistent with law" utilized less explicit language than found in other congressional waivers. See, e.g., the acts creating non-Indian federal corporations which invariably use the phrase, "sue and to be sued," enumerated in Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 390, n. 3 (1939).

[10] Construing the corporate charter waiver narrowly is consistent with how Congress has carefully preserved the immunity of Indian property from suit even when the immunity of federal property from suit is waived. Thus, in the Act of October 25, 1972, 86 Stat. 1176, 28 U.S.C. § 2409a, which waives the sovereign immunity of the United States for quiet title actions, Congress stated, "This section does not apply to trust or restricted Indian lands." The exemption was founded on the federal government's policy to avoid "abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians." 1972 U.S. Code Congressional and Administrative News 4547, 4556-4557.

pledged or assigned which are necessary to the conduct of corporate business not inconsistent with law. The alleged tortious conduct involved in the present dispute obviously involves no proprietary or corporate business activity of the Fort Belknap Indian Community. Nor is there involved any specific pledge of income or chattels. There is no basis, therefore, for contending that the Fort Belknap Indian Community impliedly waived its sovereign immunity from suit for the alleged tortious conduct of one of its police officials when it adopted a corporate charter.[11]

CONCLUSION

The holding of the Montana courts subjecting the Fort Belknap Indian Community to suit in a state tort action constitutes yet another unwarranted and unauthorized interference by the Montana state courts into the lives of federally protected Montana Indian tribes. The decision is in conflict with the rulings of this Court respecting waivers of sovereign immunity and is inconsistent with the rulings of other courts which have limited the waiver of sovereign immunity consented to in tribal corporate charters to suits involving tribal business activities as opposed to official tribal governmental actions. Moreover, the holding below will significantly affect the level of governmental services currently rendered by the 131 Indian tribes with IRA corporate charters. These tribes have only very limited financial resources. They cannot run the risk of exposing their tribal treasuries to a myriad of

[11] Aggrieved persons may obtain relief against arbitrary tribal actions which cause deprivations of civil rights in federal court under the provisions of the Indian Civil Rights Act, 82 Stat. 77, 25 U.S.C. § 1302, *et seq.* *See,* United States v. Mazurie, 419 U.S. 544, 558, n. 12 (1975). However, that alternative has not been attempted by Gardipee, and it is therefore not an issue in this case.

private damage suits.[12] As a result, badly needed tribal law enforcement, health, and welfare activities will be curtailed. Federal services may have to be increased to offset the loss of tribal programs.

The question of the scope of the waiver of sovereign immunity in the Indian Reorganization Act is of great importance to both Indian tribes and the federal government. This Court on two recent occasions has granted certiorari to assure that long standing federal Indian policies are not ignored and swept aside in Montana. *Kennerly* v. *District Court,* 400 U.S. 423 (1971); *Fisher* v. *District Court,* 424 U.S. 382 (1976). Petitioner requests this Court once again to exercise its powers of review and to grant a writ of certiorari to review the decision of the Supreme Court of the State of Montana.

Respectfully submitted,

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NATIVE AMERICAN RIGHTS FUND
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Counsel for Petitioner

December 30, 1976

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[12] The policy of protecting government treasuries from suit continues to be a primary concern of Congress. In Public Law 94-574, October 21, 1976, Congress recently amended the Administrative Procedure Act, 5 U.S.C. § 702, to eliminate the defense of sovereign immunity of the United States with respect to any action in a court of the United States seeking relief *other than money damages* based on the assertion of unlawful official action by a Federal officer or employee. The United States can now be named as a party defendant in Administrative Procedure Act cases but its treasury remains protected from judgment.

APPENDIX

SUPREME COURT OF MONTANA

Oct. 7, 1976.

No. 13443.

THE STATE OF MONTANA *ex rel.* THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, Montana, *Relator,*

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, and the HONORABLE BERNARD W. THOMAS, *Respondents.*

554 P.2d 1115

Philip E. Roy, Browning, presented ex parte argument.

Order

PER CURIAM:

In this original proceeding relator seeks an appropriate writ to require the district court of the twelfth judicial district, in and for the County of Blaine, to reverse and set aside its order of February 23, 1976, denying a motion to dismiss the cause entitled James W. Gardipee, Plaintiff, vs. Fort Belknap Indian Community of the Fort Belknap Reservation, Montana, Defendants, now pending in said court.

Counsel were heard in ex parte presentation and the matter taken under advisement.

The Court now being advised denies the petition and this proceeding is ordered dismissed.

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

JAMES W. GARDIPEE, *Plaintiff*,

-VS-

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA, *Defendants*.

(Filed February 24, 1976)

Order Denying Motion to Dismiss

Defendant's motion to dismiss plaintiff's complaint on the ground that the Court lacks jurisdiction of the subject matter of the action and of the defendant, has been submitted to the Court on the briefs of counsel. Now, it appearing to the Court that (1) the action is based on acts alleged to have occurred outside the exterior boundaries of the Fort Belknap Indian Reservation, and (2) although defendant may have immunity from suit, it has waived such immunity in its corporate charter, (without consenting to the levy of any judgment, lien or attachment upon the property of the community other than income or chattels specifically pledged or assigned.) the Court concludes that it has jurisdiction of the subject matter of the action and of defendant, subject to the limitations expressed in the charter.

It is, therefore, hereby ORDERED that the motion to dismiss be and it is hereby denied. Defendant is allowed twenty (20) days from this date in which to further plead.

DATED this 2nd day of February, 1976.

/s/ B. W. THOMAS
Judge of the District Court

(Caption Omitted in Printing)

Amended Complaint

(Filed Nov. 20, 1975)

COMES Now, the above plaintiff and alleges:

For plaintiff's First Cause of Action:

1. That the defendant, Fort Belknap Indian Community of the Fort Belknap Reservation, Montana, is a federal corporation chartered under the Act of June 18, 1934, of the United States Congress.

2. That the management and affairs of such defendant corporation are conducted by the Community Council.

3. That defendant's corporate charter contains a provision whereby it consents to be sued in courts of competent jurisdiction in the United States and that by reason of such consent, this Court has jurisdiction over the defendant with respect to the matters at issue herein.

4. The Leon Martinez, at all times herein mentioned, was employed by and acting under and within the scope of his employment as the Chief of Police for the said defendant, Fort Belknap Indian Community of the Fort Belknap Reservation, Montana, and as such was acting in 'he performance of his duties.

5. That on or about the 4th day of October, 1974, the said Leon Martinez claims to have arrested plaintiff for driving a motor vehicle on the Fort Belknap Indian Reservation without a valid Montana vehicle operator's license.

6. That following said claimed arrest, plaintiff was ordered to accompany the said Leon Martinez in a vehicle owned by the defendant, Fort Belknap Indian Community of the Fort Belknap Reservation, Montana, and then and there being used by Leon Martinez in the performance of his duties as such defendant's Chief of Police.

7. That at a point on U.S. Highway No. 2, approximately 1 mile west of Harlem, in Blaine County, Montana, plaintiff requested that he be allowed to leave said automobile and custody of the said Leon Martinez. That in response to such request Martinez stopped said automobile, at which time plaintiff departed therefrom and proceeded to walk back to Harlem via the Burlington Northern Railway right-of-way.

8. That while plaintiff was walking along said Burlington Northern Railway right-of-way as aforesaid, the said Leon Martinez committed an intentional, wanton, malicious, unlawful, brutal, unnecessary and unprovoked assault and battery upon the plaintiff, by shooting him with a revolver then and there loaded with bullets, one of which passed through plaintiff's left leg.

9. As a proximate result of the aforesaid gunshot wound received by plaintiff, he was severely injured. Said injuries have caused plaintiff to suffer excruciating physical and mental pain and anguish and to cause him to become permanently disabled, to his damage in the sum of $75,000.00. That plaintiff further suffered a loss of earnings by reason of such injuries amounting to the sum of $5,000.00.

For a Second, Separate, and Further Cause of Action, plaintiff incorporates herein with the same force and effect as though stated verbatim, Paragraphs 1, 2, 3, 4, 5, 6, 7, 9 of plaintiff's First Cause of Action, and further alleges:

That while plaintiff was walking along said Burlington Northern Railway right-of-way as aforesaid, the said Leon Martinez negligently shot plaintiff with a revolver then and there loaded with bullets, one of which passed through plaintiff's left leg.

WHEREFORE, plaintiff prays judgment against the defendant as follows:

1. The sum of $75,000.00 general damages.
2. The sum of $5,000.00 for special damages.
3. For costs of suit incurred herein.
4. For such other and further relief as to this Court seems proper.

MORRISON, ETTIEN & BARRON

/s/ By (Illegible)
Attorneys at Law
339 Third Street
P.O. Box 1070
Havre, Montana 59501
Attorneys for Plaintiff

(Certificate of Mailing Omitted in Printing)

Corporate Charter of the Fort Belknap Indian Community, Montana

[Gros Ventre and Assiniboine]

Ratified August 25, 1937

Whereas, the Fort Belknap Indian Community of the Fort Belknap Reservation in Montana constitutes a recognized Indian Community organized under a constitution and by-laws ratified by the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation on October 19, 1935, and approved by the Secretary of the Interior on December 13, 1935, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378); and

Whereas, more than one-third of the adult Indians on the Fort Belknap Indian Reservation who are members of

the Gros Ventre and Assiniboine Tribes have petitioned that a charter of incorporation be granted to such community, subject to ratification by vote of said Indians living on said reservation;

Now, therefore, I, Charles West, Acting Secretary of the Interior, by virtue of the authority conferred upon me by the said Act of June 18, 1934 (48 Stat. 984), do hereby issue and submit this charter of incorporation to the Fort Belknap Indian Community of the Fort Belknap Reservation to be effective from and after such time as it may be ratified by a majority vote of the adult Indians living on the reservation, at an election in which at least thirty per cent of the eligible voters vote.

1. *Corporate Existence.* In order to further the economic development of the Fort Belknap Indian Community of the Fort Belknap Reservation in Montana by conferring upon the said community certain corporate rights, powers, privileges and immunities; to secure for the members of the Community an assured economic independence; and to provide for the proper exercise by the Communities of various functions heretofore performed by the Department of the Interior, the aforesaid community is hereby chartered as a body politic and corporate of the United States of America, under the corporate name "The Fort Belknap Indian Community."

2. *Perpetual Succession.* The Fort Belknap Indian Community shall, as a Federal corporation, have perpetual succession.

3. *Membership* [as Amended]. The Fort Belknap Indian Community shall be a membership corporation. Its members shall consist of all persons now or hereafter members of the Community, as provided by its duly ratified and approved Constitution and By-laws, as amended.

4. *Membership* [as Amended]. The Fort Belknap Community Council consisting of six (6) members of the Gros

Ventre Tribe of Indians and six (6) members of the Assiniboine Tribe of Indians of the Fort Belknap Indian Reservation, elected by all the electors of the Community, shall exercise all the corporate powers hereinafter enumerated.

5. *Corporate Powers.* The Community, subject to any restrictions contained in the Constitution and laws of the United States, or in the Constitution and By-laws of the said community, or in this Charter, shall have the following corporate powers:

(a) To adopt, use, and alter at its pleasure a corporate seal.

(b) To purchase, take by gift, bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, subject to the following limitations:

(1) No sale or mortgage may be made by the Community of any land, or interest in land, now or hereafter held by the Community.

(2) No leases, permits (which terms shall not include land assignments to members of the Community) or timber sale contracts covering any land or interests in land now or hereafter held by the Community within the boundaries of the Fort Belknap Reservation shall be made by the Community for a longer term than ten years, and all such leases, permits, or contracts must be approved by the Secretary of the Interior or by his duly authorized representative; but oil and gas leases, mineral leases, or any leases requiring substantial improvements of the land may be made for longer periods when authorized by law.

(3) No action shall be taken by or in behalf of the Community which conflicts with regulations au-

thorized by Section 6 of the Act of June 18, 1934, or in any way operates to destroy or injure the Community grazing lands, timber, or other natural resources of the Fort Belknap Reservation.

(c) To issue interests in corporate property in exchange for restricted Indian land.

(d) To borrow money from the Indian Credit Fund in accordance with the terms of Section 10 of the Act of June 18, 1934, (48 Stat. 984), or from any other governmental agency, or from any member or association of members of the Community, and to use such funds directly for productive tribal enterprises, or to loan money thus borrowed to individual members or associations of members of the Community; *Provided,* That the amount of indebtedness to which the Community may subject itself, aside from loans from the Indian Credit Fund, shall not exceed $2,500, except with the express approval of the Secretary of the Interior.

(e) To engage in any business that will further the economic well-being of the members of the Community or to undertake any activity of any nature whatever, not inconsistent with law or with any provisions of this Charter.

(f) To make and perform contracts and agreements of every description, not inconsistent with law or with any provisions of this Charter, with any person, association, or corporation, with any municipality or any county, or with the United States or the State of Montana, including agreements with the State of Montana for the rendition of public services: *Provided,* That any contracts, other than contracts with the United States, involving payment of money by the corporation totalling in excess of $2,000 during any one fiscal year shall be subject to the approval of the Secretary of the Interior or his duly authorized representative.

(g) To pledge or assign chattels or future income due or to become due to the Community under any notes, leases, or other contracts, or from any other source, whether or not such notes, leases, or contracts are in existence at the time: *Provided,* That such agreement of assignment, other than agreements with the United States, shall not extend more than ten years from the date of execution and shall not cover more than one half the income from any source: *And provided further,* That any such agreement shall be subject to the approval of the Secretary of the Interior or his duly authorized representative.

(h) To deposit corporate funds, from whatever source derived, in any national or state bank to the extent that such funds are insured by the Federal Deposit Insurance Corporation, or secured by a surety bond, or other security, approved by the Secretary of the Interior; or to deposit such funds in the Postal Savings Bank or with a bonded Disbursing Officer of the United States to the credit of the community.

(i) To sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power to sue and to be sued shall not be deemed a consent by the Community or by the United States to the levy of any judgment, lien or attachment upon the property of the Community other than income or chattels specially pledged or assigned.

(j) To exercise such further incidental powers not inconsistent with law, as may be necessary to the conduct of corporate business.

6. *Termination of Supervisory Powers.* Upon the request of the Communcity Council of the Fort Belknap Indian Community for the termination of any supervisory power reserved to the Secretary of the Interior under Sections 5(b)(2), 5(d), 5(f), 5(g), 5(h), and Section 8 of this Charter, the Secretary of the Interior, if he deems it wise

and expedient to do so, shall thereupon submit the question of such termination or grant for ratification by the Community. If the Secretary of the Interior shall approve such termination it shall be effective upon ratification by a majority vote of the adult members of the Community residing on the reservation, at an election in which at least 30 per cent of the eligible voters vote. If the Secretary shall disapprove such termination, or fail to approve or disapprove it within 90 days after its receipt, it may then be submitted by the Secretary or by the Community Council to popular referendum of the adult members of the Community actually living within the reservation, and if approved by two-thirds of the eligible voters shall be effective.

7. *Tribal Rights and Claims.* (a) Property rights and present and future claims of the Gros Ventre and Assiniboine Tribes of Indians who have entered into a partnership to form the Fort Belknap Indian Community for the management of their joint affairs, shall not be in any way impaired by anything contained in this Charter, or in the Constitution and By-Laws of the Fort Belknap Indian Community.

(b) Nothing in this Charter, or in the Constitution and By-Laws of the Fort Belknap Indian Community shall constitute a release or waiver or shall in any way impair any present or future claims of the Gros Ventre Tribe of Indians of the Fort Belknap Indian Reservation, or of the Assiniboine Tribe of Indians of the Fort Belknap Indian Reservation, against the United States, against each other, or against any other tribe or tribes of Indians.

(c) The tribal unallotted lands of the Fort Belknap Indian Reservation are hereby vested in the Fort Belknap Indian Community, subject however to the restrictions contained in Section 7, paragraph (b) of this Charter.

(d) The Gros Ventre members of the Community Council and the Assiniboine members of the Community Council shall each have sole and exclusive jurisdiction over all matters concerning the exclusive property rights and

present and future claims of each of their said tribes, and shall transact the exclusive business policy and administrative affairs of their respective tribes, and shall exercise their said several powers to the same extent and for the same purposes as exercised by each of said tribal councils prior to the ratification of the Fort Belknap Indian Community Constitution and By-laws and the granting of this Charter.

(e) That the administration of moneys borrowed by the Fort Belknap Indian Community and reloaned to members of the community or associations of such members shall be under the jurisdiction of two sub-committees of the council, one consisting only of Gros Ventre councilmen to administer all loans to Gros Ventre Indians, and one consisting only of Assiniboine councilmen to administer all loans to Assiniboine Indians. The amounts allocated to the two sub-committees shall be equal except in so far as demonstrated differences in population or need warrant any other equitable division.

8. *Corporate Dividends.* The Community may issue to each of its members a nontransferable certificate of membership evidencing the equal share of each member in the assets of the Community and may distribute per capita, among the recognized members of the Community, all income of the Community over and above sums necessary to defray corporate obligations to members of the Community or to other persons and over and above all sums which may be devoted to the establishment of a reserve fund, the construction of public works, the costs of public enterprises, the expenses of the Community government, the needs of charity, or other corporate purposes. No such distribution of profits in any one year amounting to a distribution of more than one half of the accrued surplus, shall be made without the approval of the Secretary of the Interior.

9. *Corporate Accounts.* The officers of the Community shall maintain accurate and complete public accounts of

the financial affairs of the Community, which shall clearly show all credits, debts, pledges, and assignments, and shall furnish an annual balance sheet and report of the financial affairs of the Community to the Commissioner of Indian Affairs. The Secretary Treasurer of the Fort Belknap Indian Community shall pay out money only in accordance with the orders and resolutions of the Community Council, and no disbursements shall be made without the signature or approval of the Secretary-Treasurer. The books of the Secretary-Treasurer shall be audited at the direction of the Community Council or of the Commissioner of Indian Affairs, and shall be open to inspection by members of the Community or duly authorized representatives of the Secretary of the Interior at all reasonable times.

10. *Amendments.* This Charter shall not be revoked or surrendered except by Act of Congress, but amendments may be proposed by resolutions of the Community Council which if approved by the Secretary of the Interior, to be effective shall be ratified by a majority vote of the adult members living on the reservation at a popular referendum in which at least 30 per cent of the eligible voters vote.

11. *Ratification.* This Charter shall be effective from and after the date of its ratification by a majority vote of the adult members of the Fort Belknap Indian Community living on the Fort Belknap Reservation, provided at least 30 per cent of the eligible voters shall vote; such ratification to be formally certified by the Superintendent of the Belknap Indian Community.

Submitted by the Acting Secretary of the Interior for ratification by the Fort Belknap Indian Community in a popular referendum to be held on August 25, 1937.

CHARLES WEST
Acting Secretary of the Interior

Washington, D. C., July 29, 1937.

[Seal]

CERTIFICATION

Pursuant to Section 17 of the Act of June 18, 1934 (48 Stat. 984), this Charter, issued on July 29, 1937, by the Acting Secretary of the Interior to the Fort Belknap Indian Community of the Fort Belknap Reservation, was duly submitted for ratification to the adult Indians living on the Reservation and was on August 25, 1937, duly carried by a vote of 277 for and 158 against, in an election in which over thirty percent of those entitled to vote cast their ballots.

RICHARD KING,
President of the Fort Belknap Indian Community.

F. W. BOYD
Superintendent of Fort Belknap Agency.